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Supreme Court, U.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. .....

LEA SPEARS,
Petitioner,

vs.

STATE OF MISSISSIPPI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Mississippi

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INTRODUCTORY STATEMENT

The petitioner, Lea Spears, respectfully petitions for a writ of certiorari to review a judgment and order made by the Supreme Court of Mississippi, unofficially reported as **Spears v. State**, 257 So.2d 876. The opinion is "PER CURIAM AFFIRMED."

Rehearing was denied February 28, 1972.

The Supreme Court of Mississippi affirmed a judgment against the petitioner entered by the Circuit Court of Warren County, Mississippi, on July 21, 1971. The petitioner was convicted of the crime of abortion and sen-

tenced to serve five years in the Mississippi State Penitentiary.

The decision of the Mississippi Supreme Court was handed down on January 24, 1972. A copy of the judgment is attached and marked Appendix A.

Petition for rehearing was denied, without opinion, on February 28, 1972. A copy of the judgment denying the petition for rehearing is appended and marked Appendix B.

A copy of an order permitting the petitioner to remain at large on bail pending a determination of this petition is attached and marked Appendix C.

A former opinion involving petitioner's first conviction on the same charge is unofficially reported as **Spears v. State**, 241 So.2d 148, decided November 9, 1970, by the Supreme Court of Mississippi, a copy of which is appended, bound with this petition and marked Appendix D. A coy of the November 9, 1970 judgment is marked Appendix E.

JURISDICTIONAL STATEMENT

Petitioner believes this Court has jurisdiction to review the decision by writ of certiorari by virtue of 28 USC § 1257 (3). Petitioner also believes this Court has jurisdiction to review the decision by appeal by virtue of 28 USC § 1257 (1), (2).

QUESTIONS PRESENTED FOR REVIEW

1. Did petitioner's conviction deprive her of the rights guaranteed to her by the Sixth Amendment to be confronted with the witnesses against her?

2. Is Mississippi's abortion statute unconstitutionally vague and overbroad?

3. Does Mississippi's abortion law constitute an arbitrary invasion of the right of a woman to determine when to bear offspring, and does it violate the fundamental right of a woman to personal and marital privacy?

Mississippi's Abortion Statute

§ 2223, **Mississippi Code of 1941**, as amended, provides as follows:

> Any person wilfully and knowingly causing, by means of any instrument, medicine, drug or other means whatever, any woman pregnant with child to abort or miscarry, or attempts to procure or produce an abortion or miscarriage shall be guilty of a felony unless the same were done by a duly licensed, practicing physician:
>
> (a) where necessary for the preservation of the mother's life;
>
> (b) where pregnancy was caused by rape.
>
> Said person shall, upon conviction, be imprisoned in the State Penitentiary not less than one (1) year nor more than ten (10) years; provided, however, if the death of the mother results therefrom, the person procuring, causing or attempting to procure or cause the illegal abortion or miscarriage shall be guilty of murder.
>
> 2. No act prohibited in paragraph 1 hereof shall be considered exempt under the provisions of subparagraph (a) thereof unless performed upon the prior advice in writing, of two (2) reputable licensed physicians.
>
> 3. The license of any physician or nurse shall be automatically revoked upon conviction under the provisions of this act.

STATEMENT OF THE CASE

Cynthia Ivy, suspecting that she was pregnant, went to a medical laboratory in Jackson, Mississippi, seeking to verify her suspicion. She gave a urine specimen to a receptionist, who did not testify. Miss Ivy did not put her name on the specimen and the receptionist did not write on the specimen or ask her name. She left the laboratory after requesting that the results be telephoned to a physician. She does not know what happened to the specimen after she left it with the receptionist.

Six days later, she telephoned Dr. Calvin Hull, a physician at the University Medical Center in Jackson. As a result of the telephone conversation, she decided to seek an abortion.

She and her roommate drove to Vicksburg in Warren County, Mississippi, and contacted the appellant on May 21, 1969.

Miss Ivy testified that the appellant exposed her vaginal orifice with a set of surgical clamps. A rubber tube, approximately eight inches long was inserted into the vagina and secured by cotton packing. The entire procedure lasted ten or fifteen minutes.

Miss Ivy lost the tube, packing and uterine lining by vaginal discharge about 6:00 a.m. on the following morning, May 22, 1969. She did not go to a physician until the following Monday. A surgical team drained and scraped the uterus; however, the technique proved ineffectual and a complete hysterectomy was required.

All of the evidence in the case tending to prove that Miss Ivy was pregnant, other than the fact that she had missed two periods, was the testimony of Dr. Hull, and the pathologist who operated the laboratory, that a urine

specimen alleged to have been given by Cynthia Ivy indicated that Cynthia Ivy was pregnant.

A medical technologist employed at the laboratory in Jackson stated that on May 5, 1969, she performed a Gravindix pregnancy test, which was positive, but she could not identify the urine specimen upon which she based her test to have been the urine specimen given by Cynthia Ivy. She said she performed approximately seventy pregnancy tests per month.

Doctor William P. Featherstone, a pathologist, testified that in his opinion, the person who gave that urine specimen examined by the medical technologist was pregnant; however, he could not identify the urine specimen on which the test was based to be that of Cynthia Ivy. Doctor Calvin Travis Hull, Cynthia Ivy's physician, testified that he received a telephone message that a test was positive. Neither physician examined Miss Ivy prior to the alleged abortion.

The appellant was convicted of the crime of abortion and an appeal was taken to the Supreme Court of Mississippi, raising the same federal questions sought to be reviewed here, by assignment of error and brief. Only one of the questions was passed upon by the Supreme Court of Mississippi. The case was reversed and remanded for another trial on the ground that the appellant was denied "the basic and fundamental right to be confronted by the witnesses against her as well as the right of cross-examination" (241 So.2d at 149).

The appellant was again convicted in the Circuit Court of Warren County and sentenced to serve a term of five years in the Mississippi State Penitentiary. Another appeal was perfected and the Supreme Court of Mississippi affirmed, without opinion, on January 24, 1972. The petitioner has exhausted her state remedies.

REASONS FOR GRANTING THE WRIT

The Mississippi Supreme Court in this case had decided a federal question of substance not theretofore determined by this court and has decided another federal question in a way probably not in accord with applicable decisions of this court.

ARGUMENT

Question One: Did Petitioner's Conviction Deprive Her of the Rights Guaranteed to Her by the Sixth Amendment to Be Confronted With the Witnesses Against Her?

This Court held in **Pointer v. Texas**, 380 U.S. 400, 85 S. Ct. 1065, 13 L.Ed.2d 923 (1965) that the confrontation clause of the Sixth Amendment was applicable to the states through the Fourteenth Amendment.

The petitioner was denied her right to be confronted with the receptionist who allegedly took the urine specimen from Cynthia Ivy. The receptionist's testimony was crucial on the issue of petitioner's guilt.

Unless Cynthia Ivy was pregnant, no crime was committed. A laboratory technician made an analysis of someone's urine and the pathologist testified that the someone who gave the urine samples was pregnant. The receptionist was a "witness against" petitioner, but never confronted petitioner.

Dr. Calvin Hull testified from a report prepared by a technician based on tests following the alleged abortion. That technician was also a "witness against" petitioner, but never confronted her.

The "testimony" of both these absent witnesses was crucial as to the question of Cynthia Ivy's pregnancy, and thus petitioner's guilt. The error was not harmless. **Schneble v. Florida**, 92 S.Ct. 1056 (1972).

It is sometimes impossible to separate the confrontation requirement and the hearsay rule, although they are not identical. **Dutton v. Evans**, 400 U.S. 74, 91 S. Ct. 210, 27 L.Ed.2d 213 (1970). Both physicians in this case testified from reports not prepared by them from physical evidence not procured by them. Neither report was trustworthy. Neither report would be described by Professor Wigmore as "reliable". Both were witnesses against petitioner. The testimony of both physicians was based on hearsay on the very question they were called to answer—was Cynthia Ivy pregnant?

California v. Green, 399 U.S. 149, 90 S. Ct. 1930, 26 L. Ed.2d 489 (1970) restates that a physical or literal confrontation is necessary.

This Court held in **Barber v. Page**, 390 U.S. 719, 725, 88 S. Ct. 1318, 1322, 20 L.Ed.2d 255 (1968):

> "The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness."

The jury cannot weigh the demeanor of witnesses the jury never sees, and an accused cannot cross-examine a witness who doesn't take the stand.

Other cases heretofore decided by this Court on the confrontation clause are **Douglas v. Alabama**, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965); **Parker v. Gladden**, 385 U.S. 363, 87 S.Ct. 468, 17 L.Ed. 2d 420 (1966); **Turner v. Louisiana**, 379 U.S. 466, 85 S. Ct. 546, 13 L.Ed.

2d 424 (1965); **Bruton v. United States**, 391 U.S. 123, 88 S. Ct. 1620, 20 L.Ed.2d 476 (1968); **Selinoes v. Allen**, 397 U.S. 337, 90 S. Ct. 1057, 25 L.Ed.2d 353 (1970); and **Nelson v. O'Neil**, 402 U.S. 622, 91 S. Ct. 1723, 29 L.Ed.2d 222 (1971).

This Court added by note in **Bruton v. United States**, 391 U. S. 123, 136, n. 12, "The reason for excluding this evidence as an **evidentiary** matter also requires its exclusion as a **constitutional** matter."

Whether the SIXTH AMENDMENT is waived from the historical, functional or conceptional viewpoints, or whether it is more or less than a collection of separate rights, it is certainly more than Professor Wigmore's view of what the hearsay rule ought to be. If the founding parents of our country had any purpose in mind by the confrontation clause, other than the ratification of the constitution, that purpose had to be to set minimum standards for the quality of evidence that will suffice to carry the constitutional burden of the prosecution to prove the accused guilty beyond a reasonable doubt and to a moral certainty. Those minimum standards were not met here. Kenneth W. Graham, Jr., **Criminal Law Bulletin**, Vol. 8, No. 2, p. 99.

There are no waiver questions here; no attempt was made by the State to justify the absence of the witnesses against petitioner; the absent witnesses against petitioner were not co-conspirators; no evidence was offered by the State of any good faith effort to obtain the presence of the witnesses against petitioner; and there was no attempt to produce the best evidence available.

Petitioner's conviction deprived her of the rights guaranteed to her by the Sixth Amendment to be confronted by the witnesses against her.

Question Two: Is Mississippi's Abortion Statute Unconstitutionally Vague and Overbroad?

Mississippi's abortion statute places no restrictions on, nor qualifications for, and in no way attempts to explain what is meant by a "duly licensed, practicing physician." The statute does not answer whether an eye, ear, nose and throat specialist, or a dentist, could perform an abortion. In **Webster's New Collegiate Dictionary**, copyright 1960, at page 636, we find the following definition of a physician:

> "(1) A person skilled in physic or the art of healing; a doctor of medicine; often distinguished from a **surgeon.**
>
> "(2) A healer or restorer; as, a physician of the soul."

In the **Webster's New International Dictionary of the English Language**, page 1629, a physician is defined as:

> "(1) A natural philosopher, an experimentalist in physics; a person skilled in physic or the art of healing; one duly authorized to treat diseases, especially by medicines; a doctor of medicine; often distinguished from a surgeon.
>
> "(2) Hence, one who heals moral or spiritual disease or infirmities, or the like; as, a physician of the soul.
>
> "(3) A student of natural philosophy or physic."

Black's Law Dictionary, page 1304, defines physician as:

> "A practitioner of medicine; a person duly authorized or licensed to treat disease; one legally engaged in the practice of medicine, without reference to any particular school."

Am. Jur. 41, Section 2, defines "Physicians and Surgeons" as:

". . . The word 'physician' in its narrow sense means one who is proficient in the art of healing by means of application of physic or medicine to the patient. In its broader sense it means any one who practices the art of healing disease and preserving health, a prescriber of remedies for sickness and disease . . . Surgery, as a specialized branch of the art of healing, is defined as being limited to manual operations, usually performed by surgical instruments or appliances by a physician legally qualified and engaged therein. The special or limited systems or schools of healing and the practitioners of such systems or schools are usually defined, both generally and by the statutes, in terms descriptive of their methods, media or instrumentalities used by them to accomplish relief or to cure the patient. To illustrate, osteopathy has been defined in rather widely varying terms, but all of the definitions agree in substance that it is the system of treatment of certain parts and tissues of the body by manipulation with the hands, without the use of medicine, drugs, or surgery. The same rule applies to chiropractic and optometry. A chiropodist is one who treats disease or malformations of the hands or feet, especially a surgeon for the feet, hands, or nails; a cutter or extractor of corns and callouses. Naprapathy is a drugless system of treating human ailments by manipulations and is based on an underlying theory that human ailments are due to a tightened or shrunken condition of a ligament. A Christian Science healer treats a disease solely by prayer. Electrotherapy is defined as the use of different forms of electric machines for therapeutic purposes. A dentist is one whose profession is to clean and extract teeth, repair them when diseased, and replace them when necessary by artificial ones . . . The question sometimes arises whether a dentist is a physician or sur-

geon, as these latter words are used in a statute. The Courts are not in accord as to this answer . . ."

Petitioner submits that what a physician is, is most unclear. The statute fails to establish whether a chiropractor, Christian Scientist, or a veterinarian are physicians.

Paragraph 2 of the statute is unconstitutionally vague:

"No acts prohibited by Paragraph 1 hereof shall be considered exempt under the provision of Sub-paragraph (a) unless performed upon the prior advice in writing of two (2) reputable, licensed physicians."

Petitioner submits that it is possible that an abortion might be performed—a legal abortion—upon the advice of a veterinarian, faith healer and then the actual abortion being done by a chiropractor. Petitioner submits that if this is true, then the statute as it now is is unconstitutionally vague.

Petitioner believes that the law—and this includes all the written statutes—should allude to the benefit of each and every citizen. Petitioner believes that when the statutes are written in such a fashion that it is impossible to determine their meaning, so that the general public is uninformed as to the law, they are unconstitutionally vague, and should be struck down.

The statute fails to state what is meant by the phrase "duly licensed". It is not clear under whose supervision and under what standards one becomes "duly licensed" to perform an abortion.

The statute does not establish in what jurisdiction one must be licensed. Doctors from other jurisdictions, due to the statute's vagueness, would be unable to determine their standing.

The statute is not clear as to what "practicing" physician means. Petitioner feels that practicing could mean

any one making a business of healing, such as an intern, a resident. Practicing may very well exclude research doctors, retired doctors, and pathologists, since they do not work with people.

Petitioner cannot ascertain what a "duly licensed" physician is.

The statute fails to define what "when necessary for the preservation of the mother's life" means. Petitioner submits that the only way possible to tell whether an abortion was necessary is to wait and see if the mother dies; then, in such case, it would have been permissible for the doctor to have performed an abortion. Petitioner submits that no criteria exists, to determine the probability of death.

The next portion of the statute to be considered is part (b), which reads "when pregnancy was caused by rape." The statute fails to make a distinction between statutory and forcible rape. Section 2358 of the Miss. Code of 1942 entitled "Rape—Carnal Knowledge of the Female Under Twelve Years of Age, Or, Being Over Twelve, Against Her Will," reads as follows:

> Every person who shall be convicted of rape, either by carnally and unlawfully knowing a female child under the age of 12 years, or by forcibly ravaging any female of the age of 12 years and upward, who shall have been convicted of having carnal knowledge of any female above the age of 12 years without her consent, by administering to her any substance or liquid which shall produce such a stupor or such imbecility of mind or weakness of body as to prevent a sexual resistance, shall suffer death, unless the jury shall fix the imprisonment in the penitentiary for life, as it may do in case of murder. In all cases where the female is under the age of 12 years old,

it shall not be necessary to prove penetration of the female's private parts where it is shown the private parts of the female have been lacerated or torn in an attempt to have carnal knowledge of her.

Section 2359, entitled "Rape—Age of Consent—18 Years":

Any male person who shall have carnal knowledge of an unmarried female person of previously chaste character younger than himself, and over 12 and under 18 years of age, upon conviction, shall be punished, either by a fine not exceeding $500.00, or by imprisonment in the County Jail not longer than six months, or by both such fine and imprisonment, or by imprisonment in the penetentiary not exceeding five years; and such punishment, within such limitations, shall be fixed by the Jury trying each case, or by the Court upon the entry of the plea of "guilty".

This means, then, that a young girl below the age of 18 (age of consent) is entitled to an abortion when she becomes pregnant. Petitioner feels that such a law could be abused.

The statute fails to make clear whether the victim's statement "that she has been raped" is sufficient to justify an abortion, or whether a conviction would be necessary. The statute fails to state the procedure, or to whom, a rape must be reported, to justify an abortion.

Petitioner further submits that the statute is unconstitutionally vague, and that a strict interpretation of this statute would prevent many of the time-honored and well-based medical practices now used in our hospitals; for instance, induced labor. The statute reads:

Any person wilfully and knowingly causing, by means of an instrument, medicine, drug, or other means whatever, any woman pregnant with child to abort or

> miscarry, attempt to procure, or produce an abortion or miscarriage, shall be guilty . . .

Petitioner submits, then, that if labor is induced, and if done without the prior advice, in writing, of two reputable, licensed physicians, as set out in the statute, and if the baby dies, then the doctor is an abortionist. If the mother should die, he is a murderer. A doctor should not have to take this chance.

Question Three: Does Mississippi's Abortion Law Constitute an Arbitrary Invasion of the Right of a Woman to Determine When to Bear Offspring, and Does It Violate the Fundamental Right of a Woman to Personal and Marital Privacy?

The Supreme Court has treated privacy as an essential right, **Boyd v. United States**, 116 U. S. 616, 630 (1886). As early as 1891, the court stated:

> "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others unless by clear and unquestionable authority of law. As well said by Judge Cooley, 'The right to one's person may be said to be a right of complete immunity: to be let alone.' **Union Pacific Ry. v. Botsford**, 141 U. S. 250, 251 (1891) (Emphasis added)."

See also, Mr. Justice Brandeis, dissenting in **Olmstead v. United States**, 277 U.S. 438, at 478 (1928), (overruled by **Katz v. United States**, 389 U. S. 347 (1967)).

Recent years have witnessed an increasing sphere of personal activity protected from government interference. There is no longer any doubt that privacy in the sphere of marriage, family and sex constitutes a fundamental right. Time and again the Supreme Court has acted to preserve the freedom, integrity and privacy of the family.

There is a constitutionally protected right to marry. **Loving v. Virginia**, 388 U.S. 1 (1967). There is a constitutionally protected right to direct the instruction of one's children. **Meyer v. Nebraska**, 262 U.S. 390 (1923); **Pierce v. Society of Sisters**, 368 U.S. 510 (1925); **Farrington v. Tokushige**, 273 U.S. 284 (1927). There is a constitutionally protected right to control of the procreative function free from unreasonable restriction from the state. **Skinner v. Oklahoma**, 316 U.S. 535 (1942).

In **Griswold v. Connecticut**, 388 U.S. 479 (1965), the Court, in holding the Connecticut birth control laws unconstitutional stated that the right to privacy, penumbral to the First, Third, Fourth, Fifth and Ninth Amendments, preserves from State interference the right to choose when to procreate and when not to procreate. This right of privacy is "no less important than any other right carefully and particularly reserved to the people" (at 785). Most recently, in the case of Belous v. California, the California Supreme Court stated:

> "The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this Court's repeated acknowledgment of a 'right to privacy' or 'liberty' in matters related to marriage, family, and sex. . . . That such a right is not enumerated in . . . the U.S. . . . Constitution is no impediment in the existence of the right." 80 Cal. Reporter 354 (1969).

A comparison of the anti-contraception law involved in **Griswold** with the Mississippi Abortion Law, leads to the conclusions that:

(1) Both statutes invade the intimate realm of marital and personal privacy;

(2) Both statutes interfere with a couple's freedom to control the number and spacing of offspring;

(3) Both statutes prevent the physician from practicing medicine and giving his best advice to his patients;

(4) Both statutes are in conflict with the solution to one of the world's most critical problems today, the population explosion.

(5) Both statutes are largely unenforceable, nevertheless prosecution hangs like a cloud over the medical profession;

(6) Both statutes discriminate against the poor and uneducated;

(7) Both statutes involve the imposition of a religious principle on the entire society.

The essence of the personal freedom impaired by anti-abortion and anti-contraception statutes is the right to control the incidence of one's children. It is not the means of control, but the power to control which is significant to the woman. The mere fact of fertilization should not ipso facto and co instante abolish or limit the right of the woman to decide whether to have a child. Under the Constitution abortion may and should be considered no more nor less than a back-up or last resort method of birth control, at least in the first trimester.

The Mississippi Abortion Law attempts to abolish the individual's rights at the instant when an ovum is fertilized. Up to that moment the couple has complete freedom of choice as to when, whether and how often they shall produce children. But once fertilization occurs, their choice ends and they may not—under criminal penalties—choose not to have a child. Here then is a case of the Government's attempt to invade, even abolish—the constitutional right to control the use of one's own procreative powers. A more egregious invasion of personal liberty cannot be imagined.

The case of **Griswold**, 381 U.S. 479 (1965), involved the Connecticut birth control law. Appellants, a Planned Parenthood League's executive director and medical director were convicted of giving information, instruction and medical advice to married persons as to means of preventing conception. The Appellants gave information, instruction and medical advice to married persons as to the means of preventing conception. They examined the wife and prescribed the best contraceptive device or material for her use. Fees were usually charged, although some couples were serviced free. The statute assailed read as follows:

> "Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars," etc.

Another section provided:

> "Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender."

The appellants were found guilty as accessories and appealed. The Supreme Court responded and ruled the statute unconstitutional, and declared at p. 1680:

> "This law, however, operates directly on an intimitate relation of husband and wife and their physician's roll in one aspect of that relation."

The court in **Griswold** recognizes a peripheral right guaranteed by the Bill of Rights, namely, that it concerns the relationship lying within the zone of privacy created by several fundamental constitutional guarantees. The court further expounded that involved here was a right of privacy affecting the basic tenets of marriage, and by the State of Connecticut for bidding the use of contraceptives there was an invasion of that right of privacy

which could not be countenanced constitutionally. **Griswold**, as it relates to the instant case, has parallel connotations because the prohibition against an abortion, at least in the early stage of one's pregnancy when the embryo or the fetus is mere protoplasm and a non-entity, is no more offensive than planned parenthood, or the control of procreation by the ingestion of contraceptive pills or the use of contraceptive devices. What is basically involved in this concentrated fact category is the right of the woman at least in the early stages of her pregnancy to choose whether or not to bear offspring. This is a fundamental right that she possesses since her own body is involved; since she should have the right to determine whether or not to have a child at said stage; whether her health, her mental wellbeing would be affected by having a child; whether her financial situation warrants her bearing a child; whether or not she should be subjected to the emotional trauma of bearing and raising a child whose conception was unwanted or at least is not appreciated. The command by virtue of the Mississippi Abortion Law that she must bear this child to fruition constitutes compulsory pregnancy, and makes the woman a slave to her own body, and a mere vessel for propagation. We conclude, therefore, that a woman in the early stages of her pregnancy has as much right to abort as she has to prevent conception by planned means of whatever kind she chooses to employ.

This rationale dictated in part the result in the case of **People v. Belous**, 458 P. 2d 194, 80 Cal. Rptr. 354 (1969), wherein that court related:

> "The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgment of a 'right of privacy' or 'liberty' in matters related to marriage, family and sex."

In **Belous** the fact situation involved a young unmarried woman who first saw her family doctor who gave her pills to abort which did not succeed. She then saw the defendant, a licensed practitioner and a specialist in gynecology and obstetrics speaking on television, advocating a change in the abortion laws. Her boyfriend made an appointment with the doctor. The defendant then channelled her to another doctor, and stated that said doctor's price would be Five Hundred Dollars. The abortion was performed by the second doctor. The second doctor implicated the defendant as having sent him the case. The defendant was charged with conspiracy under the California abortion law. The California statute provided that anyone who supplied or administered to any woman drugs or substance, or used any instrument with intent to procure the miscarriage of such woman, unless the same was necessary to preserve her life, was punishable, etc.

In **Belous** the medical specialist involved in that case contended that the statute was vague and indefinite and not criminally enforceable because it was violative of the due process clause of the Federal Constitution, and further claimed that the vagueness and indefiniteness when equated with the fundamental right of a woman to choose whether or not to bear children, invalidated and pervaded the entire statute.

In **Belous** at p. 359, a woman has constitutional rights, one of which is the right to life and to choose whether to bear children, and if a rigid construction of the phrase "necessary to preserve her life" was adopted, it would impinge on these constitutional rights. The court in **Belous** recognized a fundamental right of a woman to life as well as to choose whether or not to bear children, and cited in that case the mortality rate with respect to child births in 1966 as being 0.5 per one hundred thousand population, and 29.1 per one hundred thousand births, and the court concluded that the critical issue is not

whether such right exists, but does the state have a compelling interest in the regulation of a subject within the police powers of a state, and also whether legislation impinging on constitutionally protected areas is narrowly drawn and not of unlimited and indiscriminate sweep.

The court in **Belous** recognized also that constitutional concepts are not static, and that the statute which might have been constitutional in one era might be constitutionally tainted in another period in the light of modern medical surgical practice. The court in **Belous** further concluded that the state has no compelling interest in the protection of the embyro and fetus.

However, basically the court did conclude in **Belous**, which constitutes a landmark decision, that the fundamental right of a woman to life and to choose whether or not to bear children cannot be subordinated to an attempt to decipher the loose and vague language which controlled that California enactment particularly the legend, "necessary to preserve life."

CONCLUSION

The petitioner respectfully requests that the decision of the Mississippi Supreme Court be reversed and, there being no constitutionally admissible evidence to support the conviction, that she be discharged.

Respectfully submitted

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ROLAND C. LEWIS
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Jackson, Mississippi 39201
Counsel for Petitioner

APPENDIX A

IN THE SUPREME COURT OF MISSISSIPPI

Monday, January 24, 1972, Court Sitting : : : : : : : :

Lea Spears.

46 657

State.

This cause having been submitted at a former day of this Term on the record herein from the Circuit Court of Warren County and this Court having sufficiently examined and considered the same and being of the opinion that there is no error therein doth order and adjudge that the judgment of said Circuit Court rendered in this cause on the 21st day of July, 1971—a conviction of ABORTION and a sentence to serve a term of FIVE YEARS in the State Penitentiary—be and the same is hereby affirmed. It is further ordered and adjudged that the State of Mississippi do have and recover of and from the appellant and J. W. Mullins and Mrs. V. R. Deaton, sureties on the appeal bond herein, all of the costs of this appeal to be taxed for which let proper process issue.

MINUTE BOOK "BP", PAGE 494.

APPENDIX B

Monday, February 28, 1972, Court Sitting : : : : : : : :

Lea Spears.

46 657 vs.

State.

This cause this day came on to be heard on the petition for a rehearing filed herein and this Court having sufficiently examined and considered the same and being of the opinion that the same should be denied doth order and adjudge that said petition be and the same is hereby denied.

MINUTE BOOK "BP", PAGE 517.

APPENDIX C

IN THE SUPREME COURT OF MISSISSIPPI

Monday, March 6, 1972, Court Sitting : : : : : : : : :

Lea Spears.

46 657 vs.

State of Mississippi.

ORDERED Lea Spears is granted bail pending the filing of a petition for a Writ of Certiorari in the Supreme Court of the United States and a ruling on said petition by said Court provided she files the petition for a writ of certiorari within ninety days of January 24, 1972, bond in the sum of $30,000.00 already having been posted with the Clerk of this Court under date of January 27, 1972.

MINUTE BOOK "BP", PAGE 527.

APPENDIX D

IN THE SUPREME COURT OF MISSISSIPPI

NO. 45,961

LEA SPEARS,

V.

STATE OF MISSISSIPPI.

PATTERSON, JUSTICE:

Mississippi Constitution, Article 3, Bill of Rights, section 26 (1890) provides in part as follows:

> In all criminal prosecutions the accused shall have a right to be heard by himself or counsel, or both, to demand the nature and cause of the accusation, **to be confronted by the witnesses against him**, to have compulsory process for obtaining witnesses in his favor, and, in all prosecutions by indictments or information, a speedy and public trial by an impartial jury of the county where the offense was committed. . . . (Emphasis added.)

The appellant was tried and convicted of the crime of abortion in the Circuit Court of Warren County. One of the essentials of the crime is pregnancy.

During the course of the trial two doctors introduced as witnesses for the State were permitted to testify that the State's prosecuting witness was pregnant. One of the doctors stated that his opinion of pregnancy was based solely upon the laboratory report of his technician; that he had not examined the State witness. The other doctor also testified from a laboratory report made by a laboratory technician though he had on one occasion, in an emer-

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gency situation subsequent to the alleged abortion, personally examined the State witness.

The laboratory technicians were not offered as witnesses. The doctors' testimony, though sworn, was merely a reiteration of that which had been related to them by unsworn witnesses. This was hearsay evidence [**Dennis v. Prisock**, 221 So.2d 706 (Miss. 1969); **Hill v. Stewart**, 209 So.2d 809 (Miss. 1968); **City of Laurel v. Upton**, 253 Miss. 380, 175 So.2d 621 (1965); and **Wild v. Bass**, 252 Miss. 615, 173 So.2d 647 (1965)] which denied the defendant the basic and fundamental right to be confronted by the witnesses against her as well as the right of cross-examination. This was error of major proportion, requiring the case to be reversed and prompting the statement that it is more the duty of the State's prosecutor to safeguard the constitutional rights of a defendant than to seek conviction without them.

We find no merit in the other assignments of error.

REVERSED AND REMANDED.

ETHRIDGE, C.J., AND RODGERS, JONES, BRADY, INZER AND SMITH, JJ., CONCUR. ROBERTSON, J., AND GILLESPIE, P. J., DISSENT.

ROBERTSON, JUSTICE, DISSENTING:

I respectfully dissent. If admitting the testimony of Dr. William P. Featherston, an acknowledged expert and specialist in the field of pathology, and also a co-owner of the Bratley-Featherston Medical Laboratory, was error, then in my opinion it was harmless error.

The State's prosecution witness was a nineteen-year old young lady. It was she who became pregnant and it was she on whom the abortion was performed. She was the accuser. The defendant was confronted with her accuser

and the accuser was subjected to a grueling and rather cruel cross-examination.

The accuser testified in detail as to how she knew she was pregnant. There was no doubt in her mind that she was pregnant, and there was no doubt in the mind of the defendant who performed the abortion and was paid $150.00 cash for performing it.

The testimony of Dr. William P. Featherston and Dr. Calvin Hull was pure surplusage. Pregnancy had already been proved by the testimony of the victim herself. The State's evidence, exclusive of the doctors' testimony, met the burden on the question of pregnancy. The defense of the appellant was that she did not know, had not seen, and had nothing whatsoever to do with the prosecuting witness. The defense was not based in any way on whether or not the prosecuting witness was pregnant.

I would call attention to the fact that Dr. Featherston had at the trial his official office file specifically labeled with the name of the prosecution witness alone. He referred to it in his testimony and never did appellant ask to see the file and its contents. Dr. Featherston testified that the pregnancy test was made in his office, by a trusted employee, under his supervision and control.

Ordinarily, Bratley-Featherston Medical Laboratory never sees the patients. Specimens and samples are forwarded to them from all over the state by the patient's own doctor, and the written report is sent to that doctor. It just so happened in this case that the patient went directly to the Medical Laboratory.

With reference to official business records this Court as far back as 1908 in the case of **Grenada Cotton Compress Company v. William Atkinson**, 94 Miss. 93, 47 So. 644 (1908), had this to say:

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"We give our approval to the admirable statement of the modern rule contained in Wigmore on Evidence, § 1530. It is there said: 'The conclusion is, then, that where an entry is made by one person in the regular course of business, recording an oral or written report, made to him by one or more other persons in the regular course of business, of a transaction lying in the personal knowledge of the latter, there is no objection to receiving that entry under the present exception, provided the practical inconvenience of producing on the stand the numerous persons thus concerned would in the particular case outweigh the probable utility of doing so. Why should not this conclusion be accepted by the courts? Such entries are dealt with in that way in the most important undertakings of mercantile and industrial life. The are the ultimate basis of calculation, investment, and general confidence in every business enterprise; nor does the practical impossibility of obtaining constantly and permanently the verification of every employee affect the trust that is given to such books. It would seem that expedients which the entire commercial world recognize as safe should be sanctioned, and not discredited, by courts of justice. When it is a mere question of whether provisional confidence can be placed in a certain class of statements, there cannot profitably and sensibly be one rule for the business world and another for the courtroom. The merchant and the manufacturer must not be turned away remediless because methods in which the entire community places a just confidence are a little difficult to reconcile with technical judicial scruples on the part of the same persons who, as attorneys, have already employed and relied upon the same methods. In short, courts must here cease to be pedantic and endeavor to be practical.'" 94 Miss. at 100-101, 47 So. at 646.

In holding that hospital records were properly admitted into evidence in the case of **City of Bay St. Louis v. Huey P. Johnston,** 222 So. 2d 841 (Miss., 1969), we quoted with approval from 6 Wigmore, Evidence (3rd ed. 1940), § 1707, p. 36, the following:

> "The medical records of patients at a hospital, organized on the usual modern plan, deserve to be placed under the present principle. They should be admissible, either on identification of the original by the keeper, or an offer of a certified or sworn copy. There is a Necessity (ante, § 1421); the calling of all the individual attendant physicians and nurses who have cooperated to make the record even of a single patient would be a serious interference with convenience of hospital management. There is a Circumstantial Guarantee of Trustworthiness (ante § 1422); for the records are made and relied upon in affairs of life and death. Moreover, amidst the day-to-day details of scores of hospital cases, the physicians and nurses can ordinarily recall from actual memory few or none of the specific data entered; they themselves rely upon the record of their own action; hence to call them to the stand would ordinarily add little or nothing to the information furnished by the record alone . . ." 222 So.2d at 844.

We very plainly state in Rule 11, Rules of the Supreme Court of Mississippi:

> "No judgment shall be reversed on the ground of misdirection to the jury, or the improper admission or exclusion of evidence, or for error as to the matter of pleading or procedure, **unless it shall affirmatively appear, from the whole record, that such judgment has resulted in a miscarriage of justice."** (Emphasis added.)

Inferentially this Rule is stating that trial judges have wide latitude in the admission or exclusion of evidence, and this is as it should be. They are there on the ground, and can observe the jury in the box and the witness on the stand.

Rather than it affirmatively appearing from the whole record that the judgment has resulted in a miscarriage of justice, it very clearly appears from the whole record in this case that the decision of the jury and the trial judge was just and correct and about the only decision that a jury of reasonable people could reach.

I would have affirmed the judgment of the jury and the trial court under our harmless error rule.

GILLESPIE, P. J., JOINS IN THIS DISSENT.

APPENDIX E

Monday, November 9, 1970, Court Sitting

Lea Spears,

45 961 vs.

State.

This cause having been submitted at a former day of this Term on the record herein from the Circuit Court of Warren County and this Court having sufficiently examined and considered the same and being of the opinion that there is error therein doth order and adjudge that the judgment of said Circuit Court rendered in this cause on the 19th day of November, 1969—a conviction of abortion and a sentence to 10 years in the State Penitentiary—be and the same is hereby reversed and remanded. It is further ordered and adjudged that the County of Warren do pay the costs of this appeal to be taxed.

MINUTE BOOK "BP", PAGE 214.

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. _____

LEA SPEARS,
Petitioner,

vs.

STATE OF MISSISSIPPI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Lea Spears, who is not a licensed practicing physician, was convicted for the crime of abortion in the Circuit Court of Warren County. An appeal from that conviction was taken to the Supreme Court of Mississippi, wherein the conviction was affirmed without a written opinion. *Spears v. State,* 257 So.2d 876 (Miss. 1972). Petitioner seeks to have this Court grant certiorari in order to review the decision of the Mississippi Supreme Court.

ARGUMENT

A review of the trial record and briefs filed with the Supreme Court of Mississippi in *Spears* v. *State*, No. 46,645, the Supreme Court of Mississippi, from which petitioner now seeks review, shows that the issues as to the validity of Mississippi's abortion statute[1] were not presented below. Petitions for Certiorari will be denied by this Court when the issues raised have not been presented to the state courts. *Monks* v. *New Jersey*, 398 U.S. 71, 26 L.Ed.2d 54, 90 S.Ct. 1563 (1970); *Cardinale* v. *Louisiana*, 394 U.S. 437, 22 L.Ed.2d 398, 89 S.Ct. 1162 (1969); *Wilson* v. *Cook*, 327 U.S. 474, 90 L.Ed. 792, 66 S.Ct. 663 (1945). Petitioner has adequate means of presenting these issues to the Supreme Court of Mississippi at this time.[2] For that reason alone certiorari should be denied.

Further, petitioner has already sought relief in the federal courts. At her request a three judge federal panel has been impaneled in order to determine the constitutionality of Mississippi's abortion statute. There, the same petitioner now before this Court has presented the same argument and raised the same issues which she has now presented to this Court. The three judge federal panel has already heard arguments, however; at this time no decision has been rendered by that Court. The action before the three judge federal panel in the United States District Court for the Southern District of Mississippi, Western Division, is styled *Lea Spears* v. *John E. Ellis, District Attorney, Warren County, Mississippi, et al.*, Civil Action No. 1343(c). Respondent submits this is further grounds for the denial of the petition for writ of certiorari now before this Court.

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1. Section 2223, Mississippi Code 1942 Annotated (Supp. 1972).

2. Section 1992.5, Mississippi Code 1942 Annotated (1956).

Petitioner also contends that she was denied the right to confront witnesses against her. The trial record upon which petitioner was convicted clearly shows that Cynthia Ivy testified that she had voluntarily engaged in sexual intercourse and after missing two periods she suspected she was pregnant as her menstrual cycle had always been regular. Acting on that suspicion she visited the Bratley Clinic on May 14, 1969, to submit to a pregnancy test. The receptionist at the Clinic inquired as to where the results of the test should be sent and Cynthia Ivy informed her that the results should be sent to Dr. Calvin Hull. Miss Ivy then gave a urine specimen to a nurse. Miss Ivy also testified as to the circumstances under which the petitioner later performed an abortion upon her.

The State also called a Miss McMaster as a witness. She testified that she was a medical technologist employed at the Bratley Clinic and she testified as to her education, training and experience. She testified that she ran pregnancy tests on Miss Ivy's urine specimen and that the tests proved positive.

Dr. William F. Featherstone testified that he was a pathologist and testified as to his education, training and experience. He testified that Miss McMaster, a medical technologist, worked under his supervision and that she conducted a test on Miss Ivy's urine specimen. The results of the tests were turned over to him and his opinion, based upon the results of those tests, was that Miss Ivy was indeed pregnant. Dr. Featherstone also testified that the results of the tests were sent to Dr. Calvin Hull, Miss Ivy's physician.

Dr. Hull testified that he was an obstetrician and gynecologist. He had examined Miss Ivy in May of 1969, and he had received a report from the Bratley Laboratory concerning a pregnancy test which had been run upon Miss Cynthia Ivy. Dr. Hull also testified that he examined Miss

Ivy on May 26, 1969, and Miss Ivy was thereafter hospitalized for approximately three weeks. As a result of Dr. Hull's examination and treatment of Miss Ivy he was of the opinion that she had been pregnant prior to her coming to see him on May 26, 1969, and that she had had an abortion.

The petitioner now contends that she was denied the right to confront the witnesses against her in that the testimony of the receptionist was crucial on the issue of petitioner's guilt. However, petitioner did not attempt to call the receptionist as a witness, and the prosecution in no way prevented petitioner from so doing. Petitioner also claims that Dr. Hull testified from a report prepared by the medical technician based on tests following the abortion. There was only one statement made by Dr. Hull concerning tests made after the abortion and, there was no objection made to that statement. (R. 83) In any event that statement was brought out by petitioner's counsel.

The trial record clearly shows the petitioner was afforded every opportunity to cross-examine the state's witnesses. The technician who conducted the pregnancy test testified at petitioner's trial and was cross-examined by petitioner. The pathologist who testified at petitioner's trial in regards to the pregnancy test was thoroughly cross-examined by petitioner's counsel. The receptionist at the laboratory wherein the pregnancy test was conducted took no part in the making of the pregnancy test, and in any event, the petitioner could have called the receptionist as a witness. Dr. Calvin Hull, Miss Ivy's physician, was thoroughly cross-examined by petitioner. The prosecution in no way suppressed evidence or prohibited the petitioner from calling any witness or asking any questions.

Respondent respectfully submits the Petition for Writ of Certiorari should be denied in that the issues now raised

as to the constitutionality of Mississippi's abortion statute have not been submitted to the Supreme Court of Mississippi, that the same issues have been presented to a three judge federal panel by the petitioner and arguments have been made and briefs submitted in that case. The trial record clearly shows the petitioner was in no way denied any right to confront any witnesses against her.

Respectfully submitted,

A. F. SUMMER, Attorney General

By: TIMMIE HANCOCK
Special Assistant Attorney General

CERTIFICATE

I, Timmie Hancock, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, three copies of the foregoing Brief in Opposition to Honorable W. S. Moore, Attorney at Law, 514 Barnett Building, Jackson, Mississippi 39201; and three copies to Honorable Roland C. Lewis, Attorney at Law, 218 South President Street, Jackson, Mississippi 39201.

This the ..... day of ....., A. D., 1972.

TIMMIE HANCOCK
Special Assistant Attorney General